In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1659

EDWARD E. MILDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is not yet reported. The opinion of the district court is reported at 329 F. Supp. 759.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1972 (Pet. App. 1, 7). On June 9, 1972, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Blackmun to and including June 23, 1972. The petition was filed on June 22, 1972. Jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction of tax evasion for failing to report embezzlement income violates his privilege against self-incrimination.

2. Whether the evidence supports the jury's finding that petitioner willfully attempted to evade taxes which he knew to be due.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201, provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of willfully attempting to evade income taxes for 1963, 1964, and 1965, in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201.

In 1961, petitioner, an accountant, began a practice of causing the Milder Oil Company, one of his clients, to issue checks for federal excise taxes in excess of the company's actual tax liabilities (Tr. 247). The government's evidence showed that during the period 1960–1966, inclusive, a total of $240,377.90 was withdrawn from the company in the form of excessive

excise tax disbursements, of which $99,066.82 was disbursed by the company in the years 1963, 1964 and 1965 (Tr. 124–125, 326).

Petitioner applied the excess tax monies to federal tax liabilities of other clients, and diverted to himself those clients' tax payment checks by cashing them and keeping the proceeds (Tr. 211–212). The petitioner testified that he sequestered this money out of hatred for his cousins who owned the Milder Oil Company (Tr. 236), and that he did not spend any of it, but put it all in a box in his office (Tr. 215, 247). He also testified that he withdrew all of the approximately $150,000 from this box in 1967 and used it, with other money from various savings accounts, to pay $250,000 to his cousins in satisfaction of their demand for restitution (Tr. 223–226, 248). A defense psychiatrist testified that petitioner took the money out of a neurotic urge arising from hatred of his cousins, and not with the intent of becoming owner of the money (Tr. 284–285). Petitioner testified that while he kept a cumulative tax reporting service in his office, he did not know the funds were taxable income (Tr. 237–238).

The jury was instructed by the district court that petitioner was not on trial for embezzlement (Tr. 364), and that the petitioner's knowledge that the sequestered funds were taxable income, and his specific intent to defraud the government of taxes which he knew to be due, had to be established beyond a reasonable doubt (Tr. 348–358, 363–366). The jury was expressly charged that a civil liability for addi-

tional taxes is an insufficient basis for conviction (Tr. 360); that a taxpayer's good faith belief that he has fully paid his taxes is a defense to criminal prosecution (Tr. 358–359); and that ignorance or misinterpretation of the law would be a valid defense if a specific intent to defraud were thereby negated (Tr. 362–363).

The court of appeals affirmed petitioner's conviction on the grounds that the privilege against self-incrimination, where it has not been claimed on the tax return, is no defense to a prosecution for failing to report income from embezzlement; that restitution of embezzled income in a later year is no defense; and that defenses based on petitioner's lack of intent, and his alleged ignorance and misunderstanding of the taxability of embezzled income, were resolved against petitioner on sufficient evidence and adequate instructions.

ARGUMENT

Petitioner's contentions are without merit and there is no conflict of authority.

1. Petitioner contends (Pet. 6–9) that he cannot be punished for having falsely understated the amount of his gross income in his tax returns because he would have incriminated himself if he had reported his embezzled gains. However, the proper method of invoking the privilege against self-incrimination in such circumstances does not consist of concealing the illegal income and evading the tax but rather of reporting the amounts involved and refusing disclosure of the source. *United States* v. *Sullivan*, 274 U.S. 259.

As Mr. Justice Holmes stated for this Court in *Sullivan* (*id.* at 263–264):

> If the form of return provided called for answers that the defendant was privileged from making, he could have raised the objection in the return, but could not on that account refuse to make any return at all. * * * It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. * * *

Petitioner's Fifth Amendment privilege does not entitle him to file a return falsifying the amount of income. See *United States* v. *Knox*, 396 U.S. 77.

Petitioner's reliance upon *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, involving compulsory filing of forms requiring registration as a lawbreaker for the purpose of being identified as such to law enforcement officials, is not warranted. As Mr. Justice Brennan noted in his concurrence, 390 U.S. at 72–76, those decisions did not impair the holding of *Sullivan*; the questions on the forms in *Marchetti* and *Grosso* (and in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70) were directed at a highly selective group inherently suspect of criminal activities, whereas the questions on the income tax form here and in *Sullivan* are neutral on their face and directed at the public at large. See also *California* v. *Byers*, 402 U.S. 424, 428–430, 433–434.

2. There is no merit in petitioner's contention (Pet. 10–16) that the evidence does not support the finding by the jury that he willfully attempted to evade additional taxes which he knew to be due.

In *James* v. *United States*, 366 U.S. 213, this Court, overruling *Commissioner* v. *Wilcox*, 327 U.S. 404, held that the proceeds of embezzlement are taxable income despite the embezzler's theoretical obligation to make repayment. The jury here was instructed to consider petitioner's asserted reliance on *Wilcox* and to acquit him if a reasonable doubt existed that petitioner believed the money was his income and that it was subject to taxation. Petitioner apparently concedes that these instructions on the issue of willfulness were "adequate" (Pet. 16). The jury evidently resolved the issue of petitioner's state of mind against him.[1]

Petitioner's argument (Pet. 12), that loss carryovers from the year he repaid the embezzled funds would have the effect of reducing his taxable income in the prosecution years below the amounts then reported, is irrelevant; the crime "was complete as soon as the false and

[1] Since the jury was told to consider whether petitioner did in fact misunderstand his tax obligations, it was permissible for the trial court to decline to give petitioner's proposed instruction (Pet. 13) analyzing this Court's decisional processes on the liability issue.

fraudulent understatement of taxes * * * was filed. *Sansone* v *United States,* 380 U.S. 343, 354. Also see *Willingham* v. *United States,* 289 F. 2d 283 (C.A. 5).

Petitioner also argues (Pet. 14) that his dominion and control over the funds was insufficient as a matter of law to render them gross income to him. However, the extent of control here was no less than in *James* v. *United States, supra.* In addition, unlike the facts in *Edwards* v. *United States,* 375 F. 2d 862 (C.A. 9), upon which petitioner relies, there was no indication in this case that petitioner was engaged in "merely a postponement of disclosure or payment" (375 F. 2d at 867). The many years over which petitioner abstracted the excise tax funds, and the discrepancy between the amount of company funds abstracted ($240,377.90) and the amount in petitioner's money box (about $150,000), contradict petitioner's argument and justify the jury's disbelief in his protestations that the scheme was only a temporary act of spite.[2]

[2] In any event, insofar as *Edwards* may hold that an intention to report income at a later time is a defense to a prosecution for tax evasion, it would appear to be in conflict with *Sansone* v. *United States, supra.*

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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